

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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ENCOMPASS INSURANCE COMPANY,  
Plaintiff, Civil Action No. 05-11693-RCL

V. November 13, 2006, 3:05 p.m.

JOSEPH D. GIAMPA, et al.,  
Defendant.  
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TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE REGINALD C. LINDSAY

UNITED STATES DISTRICT COURT  
JOHN J. MOAKLEY U.S. COURTHOUSE  
1 COURTHOUSE WAY  
BOSTON, MA 02210

DEBRA M. JOYCE, RMR, CRR  
Official Court Reporter  
John J. Moakley U.S. Courthouse  
1 Courthouse Way, Room 5204  
Boston, MA 02210  
617-737-4410

1 APPEARANCES:

2 FOR THE PLAINTIFF:

3 NATHAN A. TILDEN, ESQ.  
4 RICHARD D. KING, JR., ESQ.  
Smith & Brink, P.C.  
5 350 Granite Street  
Suite 2303  
6 Braintree, MA 02184  
617-770-2241

7 FOR THE DEFENDANT JOSEPH GIAMPA:

8 MATTHEW J. CONROY, ESQ.  
9 Conroy & Associates  
114 Waltham St.  
10 Suite 25  
Lexington, MA 02421  
11 781-862-8060

12 FOR THE DEFENDANTS JENNIFER McCONNELL  
13 and BRIAN CULLINEY:

14 THOMAS M. CIAMPA, ESQ.  
Ciampa & Associates  
15 20 Park Plaza  
Suite 804  
16 Boston, MA 02116  
617-742-5955

17 FOR THE DEFENDANT EDWARD KENNEDY:

18 JEFFREY J. PHILLIPS, ESQ.  
19 DANIEL S. TREGER, ESQ.  
Phillips & Angley  
20 One Bowdoin Square  
Boston, MA 02114  
21 617-367-8787

## P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Reginald C. Lindsay, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on November 13, 2006.)

THE CLERK: Civil action 05-11693, Encompass v. Giampa.

LAW CLERK: Counsel, please identify yourselves for the record.

MR. KING: Good afternoon, your Honor. Richard King on behalf of Encompass Insurance Company.

MR. TILDEN: Good afternoon, your Honor. Nathan Tilden on behalf of Encompass Insurance.

MR. CONROY: Good afternoon, your Honor. Matthew Conroy for the defendants Joe Giampa, Frederick Giampa, Advanced Spine Centers, Future Management Corporation.

MR. CIAMPA: Good afternoon, your Honor. Thomas Ciampa for the defendants Jennifer McConnell and Brian Culliney.

THE COURT: I'm sorry, you are? What's your name?

MR. CIAMPA: I'm sorry, your Honor. Thomas Ciampa.

THE COURT: I'm sorry, your name sounded an awful like --

MR. CIAMPA: Yes, your Honor. I'm counsel for some

1 of the defendants.

2 THE COURT: Okay.

3 MR. PHILLIPS: Jeffrey Phillips on behalf of  
4 defendant Edward Kennedy.

5 MR. TREGER: And, your Honor, Daniel Treger on  
6 behalf of the defendant Edward Kennedy.

7 THE COURT: Treger?

8 MR. TREGER: T-r-e-g-e-r.

9 THE COURT: Okay.

10 All right. I have a motion to dismiss certain of  
11 the claims. Let me just make sure that I have the claims that  
12 are addressed in this motion.

13 Who's going to speak to the motion to dismiss?

14 MR. CONROY: Your Honor, I'll principally be  
15 addressing it.

16 THE COURT: So there are Counts I and II and VI and  
17 what else?

18 MR. CONROY: Your Honor, Counts I and II are  
19 subjective RICO violations, Count III is the conspiracy to  
20 violate RICO, Count V is common law conspiracy, and Count VI is  
21 common law fraud.

22 THE COURT: So you are moving to dismiss Counts I,  
23 II --

24 MR. CONROY: III, V, and VI.

25 (Discussion off the record.)

1 THE COURT: All right. Go ahead, sir.

2 MR. CONROY: Your Honor, the Court's comfortable  
3 with the procedure in terms of the prior motion and what had  
4 been denied without prejudice and what was granted and what  
5 was --

6 THE COURT: Yes, I am comfortable. Although,  
7 frankly, looking back, the record indicates that I did not deny  
8 the motion with respect to Count III, but Count III alleged --

9 MR. CONROY: That's the conspiracy to violate --

10 THE COURT: It's the conspiracy RICO violation.

11 MR. CONROY: Yes.

12 THE COURT: Looking at the docket, it says I denied  
13 the motion as to that count, and it seemed to me that looking  
14 back on it, since it had those fraud allegations which were  
15 addressed, the motion should have been granted as to that count  
16 as well. But since you are addressing, in any event, I, II,  
17 III, V, and VI all over again, probably doesn't make any  
18 difference.

19 MR. CONROY: I don't believe that it makes any  
20 difference.

21 THE COURT: Okay. Go ahead.

22 MR. CONROY: Your Honor, I'll just --

23 THE COURT: And I take it your position is with  
24 respect to all of these counts that there is the same infirmity  
25 as before.

1 MR. CONROY: That's correct.

2 THE COURT: That fraud is not alleged with  
3 particularity.

4 MR. CONROY: That's correct.

5 THE COURT: All right. Go ahead.

6 MR. CONROY: And annexed to our motion are portions  
7 from the transcript from our prior hearing. The Court had  
8 conducted a pretty pointed analysis of the deficiencies in the  
9 initial pleading, or I should say the first amended complaint,  
10 and looking specifically at what's alleged to be fraud, your  
11 Honor pointed out that it was difficult, if not impossible, to  
12 ascertain what it was that we represented to the plaintiffs in  
13 this case that was false. And we talked about overutilization,  
14 we talked about bills or medical reports that were submitted to  
15 the insurance company, and Mr. King's brief actually points out  
16 from the colloquy what you had actually said. It's interesting  
17 to note it appears in his own brief -- I'm reluctant, actually,  
18 to quote in front of you --

19 THE COURT: That's all right. If there's a record,  
20 I can't take it back. I can take it back, but it's still on  
21 the record.

22 MR. CONROY: You requested some kind of graphic  
23 form that says with respect to X, this is what they said and  
24 this is, in fact, what it is. So tell me what was false.

25 And in response one would have expected to find

1 perhaps the same exemplar claims but specifically addressing  
2 what it was in those medical records or what it was in those  
3 bills that was false.

4           Instead of doing that, we increased from 15 to 79  
5 exemplar claims with the same litany of language of  
6 overutilization in that these services weren't necessary. And  
7 when you break down what they are saying in the complaint is  
8 false, it boils down to the issue that they don't like what we  
9 did for the patients. They think that we should not have  
10 adjusted somebody as many times as we did. But the truth is  
11 that we treated a patient, we submitted a bill to them.  
12 There's nothing false or fraudulent in that.

13           They want to look at it and say it was medically  
14 unnecessary. Where did we represent, where are we making the  
15 representation that it's medically necessary? And I, of  
16 course, am not conceding that it wasn't medically necessary,  
17 but that's the basis of their case. And it's akin to, you  
18 know, square peg, round hole. You know, fraud is what fraud  
19 is. There has to be a misrepresentation. There has to be  
20 something that's false that I say that they relied on to their  
21 detriment. It's as simple as that.

22           The fact that this type of case, a chiropractic  
23 case or any medical case for that matter, that I treated a  
24 patient with a certain recipe of treatment and they don't like  
25 it doesn't amount to fraud.

1 THE COURT: If they say you treated -- they have a  
2 list of people who got heat treatments and they say -- they  
3 have numbers there, and they said that's excessive.

4 MR. CONROY: Okay.

5 THE COURT: And how do you respond to the list of  
6 79, or whatever the number is, and the allegation that it is  
7 excessive?

8 MR. CONROY: I would say where I billed for heat  
9 treatment where I didn't, in fact, perform heat treatment, that  
10 would be false. If I treat somebody 15 times for heat  
11 treatment and they think it's excessive, that's not the stuff  
12 that fraud is made of, because that's not misrepresentation.

13 THE COURT: Well, are you saying there's no  
14 misrepresentation because they haven't stated the  
15 misrepresentation? I mean, it may be a misrepresentation if  
16 you treated somebody -- gave somebody 15 treatments and that  
17 person needed only 10, then if you've treated them five more  
18 than was necessary, that might be fraud.

19 MR. CONROY: I'm not sure I'm willing to concede  
20 that. There are -- I mean, within the process, within the  
21 claims process, they have remedies here. It's -- there's got  
22 to be a material misrepresentation of fact.

23 THE COURT: I guess the point is, they are paying  
24 you for what are medically necessary treatments, right?

25 MR. CONROY: That's correct.



1 THE COURT: And so if you give somebody 25  
2 treatments and only 10 were medically necessary, the extent to  
3 which you bill for and were paid for those 15 extras, haven't  
4 you misrepresented that those 15 treatments were medically  
5 necessary?

6 MR. CONROY: I don't think I ever make that  
7 representation. There are states in this country where I'm  
8 required to make a representation that, in fact, what I did was  
9 medically necessary, but the Commonwealth of Massachusetts is  
10 not one of them.

11 THE COURT: But they only pay you for what's  
12 medically necessary.

13 MR. CONROY: That's correct. But they can do  
14 examinations on their own, they can do independent medical  
15 exams. They have people review -- review them, not only do we  
16 just give them our bills, we give them our reports as well. So  
17 they can see exactly what the patient told us, what we did,  
18 what we bill them --

19 THE COURT: If the company, Encompass, pays you  
20 only for what's medically necessary --

21 MR. CONROY: That's correct.

22 THE COURT: -- and what's medically necessary for  
23 a patient, let's say patient X, are 10 heat treatments and you  
24 bill them for 25, isn't the misrepresentation that 25 heat  
25 treatments were medically necessary when, in fact, only 10 were

1 medically necessary? And isn't that a misrepresentation if  
2 that turns out to be established?

3 MR. CONROY: I don't believe it is.

4 THE COURT: Why not?

5 MR. CONROY: Because it's -- I'm not making a  
6 representation that it's --

7 THE COURT: Sure, you send the bill. Each time you  
8 send a bill for over what is medically necessary, aren't you  
9 making a representation that that treatment was medically  
10 necessary when it was not?

11 MR. CONROY: For purposes of this argument, I'll  
12 leap to that position, although I don't concede that it's true.

13 THE COURT: Well, I don't understand -- okay. I  
14 don't understand why you wouldn't concede that, because each  
15 time you send a bill, you are sending this person needed this  
16 treatment.

17 MR. CONROY: I don't believe that's true. I don't  
18 believe that when I submit a bill to the insurance carrier that  
19 I am making representation of fact that the services provided  
20 were medically necessary.

21 THE COURT: What is the representation you are  
22 making to them?

23 MR. CONROY: The representation is --

24 THE COURT: I provided that service.

25 MR. CONROY: This is what I did.

1 THE COURT: And even if it wasn't necessary.

2 MR. CONROY: It's, in essence, an application for  
3 payment under the PIP statute.

4 THE COURT: I understand. But why do they pay --

5 MR. CONROY: Sometimes they don't always pay.

6 THE COURT: I understand. When they pay you,  
7 aren't they paying you because that treatment was necessary?  
8 They don't pay you because you treated somebody who walked in  
9 and said, you know, it would be nice if I had a heat treatment,  
10 nothing's really wrong with me, but I'd like a heat treatment  
11 and I've got this insurance, and you send the bill.

12 MR. CONROY: Sure. But under that scenario, based  
13 on what we actually send them, they would actually deny the  
14 claim. It wouldn't be causally related to an accident, and it  
15 wouldn't be necessary given what the patient's complaints are.

16 We send them bills with the medical records. They  
17 have -- and we're getting into what they don't allege, but what  
18 they're not alleging is that patient X came in, was never in a  
19 car accident, we treated, made a representation that the person  
20 was in a car accident, that it was causally related and  
21 submitted a bill. That's -- there's a misrepresentation in  
22 there, but there's got to be some false -- there's got to be  
23 something false on the bill or in the records that we did. And  
24 if -- I mean, overtreatment just doesn't fit in well with  
25 fraud, because we're not misrepresenting any facts. I don't

1 think there's any basis either in the statute or in any common  
2 law to impute into what we're sending them is a representation  
3 that what we performed was medically necessary.

4 But I'll -- to move beyond that just for a moment,  
5 assuming that that's true --

6 THE COURT: Well, let me just -- I don't want to  
7 leave this point alone. But it is not the case the insurance  
8 company pays for any service you provide; isn't that right?

9 MR. CONROY: That's correct.

10 THE COURT: They don't pay you just because  
11 somebody walked in there and said I would love to have a heat  
12 treatment.

13 MR. CONROY: That's right.

14 THE COURT: They are paying you for a reason. And  
15 isn't the reason is that the treatment was necessary for this  
16 person?

17 MR. CONROY: They pay because the statute obligates  
18 them to pay, and what the statute obligates them to pay for is  
19 medically necessary treatment that was causally related to an  
20 accident for which there was coverage under the policy.

21 THE COURT: That's right. So they're obligated to  
22 pay for medically necessary treatment.

23 MR. CONROY: That's right.

24 THE COURT: So the scenario I gave to you, what was  
25 medically necessary was 10 treatments, you bill for 25. Isn't

1       there a fraudulent element because every time you submit a  
2       bill, you're submitting a bill that every one of those  
3       treatments was medically necessary?

4               MR. CONROY: I don't think that's true.

5               THE COURT: All right. Let's go on. You're  
6       willing to accept my proposition for purposes --

7               MR. CONROY: For purposes of today I'll accept  
8       that.

9               THE COURT: All right.

10              MR. CONROY: And the next analysis is assuming  
11       that's true, how do you plead that with particularity? How do  
12       you allege that it wasn't medically necessary? Is it -- I  
13       mean, do you just get to write that as a lawyer, that they  
14       billed 25 times but only 10 were necessary? How do you decide  
15       that? Does Smith & Brink get to decide what's medically  
16       necessary?

17              THE COURT: So what you are saying now is they  
18       haven't alleged why it was not medically necessary.

19              MR. CONROY: That's right.

20              THE COURT: And that's the problem.

21              MR. CONROY: That's the second tier of the problem  
22       in my eyes, perhaps the first in the Court's.

23              THE COURT: Okay. All right.

24              MR. CONROY: The second issue -- and that,  
25       essentially, covers most of the particularity issues.

1           In terms of conspiracy, and it's really two  
2       different analyses that need to be done; one involves the  
3       common law conspiracy in the Massachusetts claim, and that's  
4       dealt with pretty inclusively in the Hayduk case, which is  
5       cited.

6           THE COURT: Is that Count VI?

7           MR. CONROY: That's Count V.

8           THE COURT: V.

9           Hayduk v. Lanna, actually a district court decision  
10       that went up to the 1st Circuit. But they said conspiracy to  
11       commit fraud is covered by 9(b), assuming that it's not a  
12       coercion situation. And there's --

13          THE COURT: So you say if you allege that there is  
14       a conspiracy to commit fraud, you also have to allege what the  
15       fraud is with particularity.

16          MR. CONROY: That's what Hayduk says.

17          THE COURT: In other words, you have to allege that  
18       the defendants agreed together to commit this kind of fraud and  
19       the kind of fraud has to be alleged with particularity.

20          MR. CONROY: Yes.

21          THE COURT: Okay.

22          MR. CONROY: The second issue comes up in terms of  
23       conspiracy to violate civil RICO, and that's -- I don't believe  
24       there's a 1st Circuit case out there, and I don't believe  
25       there's a Supreme Court decision out there, but we've cited

1 several cases across the country that essentially say we  
2 shouldn't let plaintiffs bootstrap -- if they can't plead the  
3 substantive case, they shouldn't be able to just say, okay,  
4 we're going to say it's conspiracy to violate civil RICO and  
5 that will get us beyond. And then maybe once we conduct a  
6 discovery, we amend the complaint and bring a substantive  
7 action.

8           It's impossible for me not to look at the facts of  
9 this case, because the conspiracy is completely interrelated to  
10 the underlying substantive claims. It's all mail fraud that's  
11 being alleged as predicate acts. So as far as the substantive  
12 claims, clearly, clearly 9(b) applies; and when we look at the  
13 conspiracy to violate, say, look, all they have to prove is  
14 there was a tacit agreement to violate a substantive RICO  
15 provision. Are we not going to look at what the substantive  
16 RICO provision is? It almost doesn't make sense to do that.  
17 And when you look -- I understand the Court's reluctance, and  
18 from an intellectual standpoint when you look at the elements  
19 of conspiracy to violate RICO, it's hard to read into that  
20 where the requirement would come from to plead with  
21 specificity, but in this specific case, where the alleged  
22 conspiracy is to violate what amount to the allegations from  
23 Counts I and II, if I and II fail, it doesn't make sense that  
24 they should be able to proceed on Count III.

25           THE COURT: So you say if there's a conspiracy to

1 violate the RICO statute and that violation consists of the  
2 defendants engaging in mail fraud, which is essentially what  
3 this claim is, they have to outline the contours of the mail  
4 fraud with particularity. Is that your position?

5 MR. CONROY: That's correct. That's correct. It's  
6 certainly not my position, just to be clear, that all  
7 conspiracy to violate RICO requires pleading with  
8 particularity.

9 THE COURT: Well, because I guess you could have  
10 bank robbery as the underlying --

11 MR. CONROY: It could be --

12 THE COURT: -- and you don't have to have bank  
13 robbery --

14 MR. CONROY: It could be murder, extortion. If  
15 there's no requirement for the underlying acts, they're not  
16 required.

17 THE COURT: So your point is, if the underlying  
18 predicate act is fraud, then the allegation of conspiracy to  
19 commit that fraud has to result in a statement of the fraud, of  
20 the fraudulent scheme with particularity.

21 MR. CONROY: That's correct.

22 THE COURT: Okay.

23 MR. CONROY: And that is essentially the substance  
24 of our --

25 THE COURT: Weather you are saying with respect to



1 all these Counts I, II, III, V, and VI is that fraud is not  
2 alleged with particularity. You're actually saying two  
3 things: There was no fraud because -- there was no fraud, and  
4 there is no particular allegation of fraud.

5 MR. CONROY: That's correct.

6 THE COURT: Okay.

7 Anybody else want to speak to these claims before I  
8 hear from the plaintiff?

9 MR. CIAMPA: Your Honor, I'd like to add just a  
10 couple of things.

11 THE COURT: First of all, let me ask you if you  
12 agree with Mr. Conroy that there may be a misrepresentation if  
13 you treat somebody when that person needed 10 treatments and  
14 you give them 15? When I say that person needed, it was  
15 medically necessary that the person get 10 treatments and  
16 instead the person received 15 treatments, and that the  
17 submission of a bill each time is a representation that the  
18 person needed that treatment was medically necessary to the  
19 person to have that treatment so there may be fraud any time  
20 you send a bill for what is not medically necessary. Do you  
21 agree with the proposition that that is not fraud?

22 MR. CIAMPA: I do, your Honor. Unless you  
23 otherwise represent that what you have prescribed in the way of  
24 regiment or treatment is medically necessary in your opinion.

25 THE COURT: Don't you represent when you submit the

1 bill that the treatment you provided was medically necessary?

2 MR. CIAMPA: You know, it occurred to me, your  
3 Honor, when we got plaintiff's opposition that I might file a  
4 reply brief, and because I was looking at this case, I thought  
5 to myself, is it really necessary for me to file a reply  
6 brief? Does the Court understand what the basis of the dispute  
7 is between the parties or is there some advantage? And if I  
8 do, in fact, file a reply brief --

9 THE COURT: You didn't file one, right?

10 MR. CIAMPA: No.

11 THE COURT: But tell me what you would have said to  
12 this question.

13 MR. CIAMPA: To this question, your Honor, I would  
14 have said exactly what I'm saying, is should I, in the event  
15 that I filed one and it wasn't necessary, be accused of fraud  
16 or simply overzealous advocacy for which the client shouldn't  
17 not necessarily have to pay? I think the question really is --

18 THE COURT: I missed that point.

19 MR. CIAMPA: The question is, your Honor, how easy  
20 do we want to make it for someone to allege fraud?

21 THE COURT: There are two questions. One of the  
22 questions is whether there is fraud.

23 MR. CIAMPA: Correct.

24 THE COURT: Whether there's been a  
25 misrepresentation.

1 MR. CIAMPA: Whether there's been a  
2 misrepresentation.

3 THE COURT: That's one question.

4 MR. CIAMPA: Correct.

5 THE COURT: The other question is, assuming there  
6 is a misrepresentation, has the misrepresentation been alleged  
7 sufficiently to meet the requirements of Rule 9(b)?

8 MR. CIAMPA: Correct, your Honor.

9 THE COURT: But you and Mr. Conroy start with the  
10 proposition there's not even an allegation of misrepresentation  
11 in most of this.

12 MR. CIAMPA: Correct.

13 THE COURT: Because the mere submission of a bill  
14 is no representation at all, except that I did this and I'm  
15 owed the money.

16 MR. CIAMPA: There is a medical record, your  
17 Honor. It is a record of the occurrences.

18 THE COURT: Yes.

19 MR. CIAMPA: A patient comes in and I observe  
20 something and I recorded it in the medical record.

21 THE COURT: Yes.

22 MR. CIAMPA: And then I prescribe treatment and I  
23 record that.

24 THE COURT: Right.

25 MR. CIAMPA: I send it along to the insurance

1 company. They see what I've seen, they see what I've done.  
2 They are in a position to determine whether or not they feel  
3 like I need to be paid under the statute, because that's what  
4 this --

5 THE COURT: But whether -- you know, whether they  
6 agree with that or not, but you have made a representation to  
7 them about that, haven't you?

8 MR. CIAMPA: I have made a representation that I  
9 have rendered treatment and this is the treatment I've rendered  
10 and it's in response to the following observations.

11 THE COURT: I see. And you are not saying --

12 MR. CIAMPA: I am not saying --

13 THE COURT: -- that it was necessary.

14 MR. CIAMPA: That had this patient not received  
15 this treatment, he would have for certain gotten worse or for  
16 certain had something ill to fall upon him.

17 THE COURT: So it's up to them to catch the fraud  
18 if there is fraud.

19 MR. CIAMPA: But, your Honor, there's a broad  
20 spectrum for people to disagree as to what is medically  
21 necessary.

22 THE COURT: I understand.

23 MR. CIAMPA: Obviously, it's our malpractice --

24 THE COURT: I understand. I understand that you  
25 may disagree, I'm not talking about disagreement. I'm saying,

1 let's suppose everybody agrees that patient X should have only  
2 10 treatments but he got 15, and if you give him any number of  
3 treatments above 10, aren't you representing that he needed  
4 those treatments?

5 MR. CIAMPA: In my medical opinion?

6 THE COURT: In your medical -- yes, right.

7 MR. CIAMPA: Your Honor, again, I would say no, but  
8 say that's true. I'm going to follow my brother's act.

9 THE COURT: Okay. I guess I'm not going to get you  
10 off this.

11 Go ahead.

12 MR. CIAMPA: Say that's true. Then the question  
13 is: When does it become medically unnecessary?

14 THE COURT: That's a separate question.

15 MR. CIAMPA: Well, but that's where the fraud needs  
16 to be pled with particularity, because if it's necessary in  
17 some circumstances and not necessary in others, we need to know  
18 where one lets off and the other begins, otherwise we don't  
19 know what the fraud is.

20 THE COURT: Okay. I understand that proposition,  
21 and the only proposition I've been questioning about is whether  
22 there's any representation of something being medically  
23 necessary every time you submit a bill.

24 MR. CIAMPA: And I would say no, your Honor. I  
25 would say, again, it's a record of what occurred: Patient

1 comes in, this is what I observed, this is how I treated this  
2 patient.

3 Now, Encompass is and has been free, and has  
4 exercised that freedom to under the statute to make its own  
5 determination as to whether it thinks that it's medically  
6 necessary as defined under the statute. And it pays in  
7 instances where it opines that it is, and it doesn't in  
8 instances where it opines that it does not.

9 THE COURT: So I take it your position is that  
10 everything we did in our opinion should have been done.

11 MR. CIAMPA: That's right, your Honor. But even if  
12 it hadn't been the case, it wouldn't necessarily give them a  
13 cause of action for fraud. There are other remedies  
14 available. They've availed themselves of other remedies.  
15 There are remedies that your Honor decided would not drop out  
16 of this case in our first run at a motion to dismiss. So what  
17 we are saying here is whether or not -- it doesn't matter for  
18 purposes of our discussion whether or not it constitutes fraud  
19 because the plaintiffs have a remedy. They have a remedy of  
20 nonpayment, they have a civil action which allows them to  
21 exercise their right to not pay, and what we're saying, it  
22 doesn't arise to the level of what constitutes fraud.

23 THE COURT: Okay.

24 Anybody else want to speak to this?

25 MR. PHILLIPS: I don't believe I have anything to

1 add.

2 THE COURT: You agree with the other counsel that  
3 you're making no representation as to medical necessity when  
4 you send the bill?

5 MR. PHILLIPS: Yes. I don't think I can add  
6 any more. I think it's --

7 THE COURT: Okay.

8 MR. KING: Thank you, your Honor. This is the  
9 first time in my years of RICO practice that I have heard that  
10 defense.

11 THE COURT: Which defense?

12 MR. KING: The defense that our bills are not  
13 representations. Clearly they are. The mail fraud alleged in  
14 a case like this, all the mail fraud doesn't have to actually  
15 contain misrepresentations, as I'm sure counsel knows, but in  
16 this case, perhaps they're not familiar with the fact that  
17 every federal form, HCVA form, so-called medical bill that was  
18 submitted by this outfit First Spine, every single one of them  
19 to my client contains language on the bill where it's -- and  
20 it's signed by, in this one example that's made part of the  
21 record, by Brian Culliney, one of the named defendants. It  
22 says, "Signature of physician or supplier certifying that the  
23 services shown on this form were medically indicated necessary  
24 for health of the patient and personally furnished." Lower  
25 down it says, "I certify that the services listed above were

1 medically indicated and necessary."

2 So I think it's just disingenuous to stand here and  
3 make the argument that, oh, no, this is an application for  
4 payment, if we're lucky enough that Encompass is stupid and  
5 pays us, as the Court suggested, you know, we've got to -- we  
6 can never rely on the good faith of those people that are doing  
7 business with us, we've got to go out there and spend money to  
8 catch them in a lie. That's number one.

9 Number two, with respect to the argument they keep  
10 referring to the statute, the statute. The statute is --  
11 creates a third-party beneficiary contract relationship with a  
12 medical provider or so-called unpaid medical provider in  
13 Massachusetts and insurers, and those bills in the statute  
14 itself, which we cite in both complaints, we're on the second  
15 amended complaint, says that the insurers will pay for  
16 reasonable fees for medically necessary types of treatment.  
17 And then it goes into some specificity.

18 So the argument that the representations contained  
19 in these bills, which we've alleged at this procedural posture,  
20 12(b)(6), wouldn't be sufficient, because the question is not  
21 are they fraud, I think is if any set of facts can be proven at  
22 12(b)(6), then the plaintiff is allowed to go forward.

23 Now, when we were here last in June, the Court --  
24 and there was some colloquy that we did cite in our second  
25 opposition to the motions to dismiss, wherein your Honor talked



1 about, you know, perhaps you could give me some more  
2 specificity as we had done in connection with the 12 exemplars  
3 the first time around, but give it to me in graphic form, which  
4 I think we've done --

5 THE COURT: Well, I wasn't just looking for graphic  
6 form.

7 MR. KING: No, I understand, and as my brothers  
8 have complained, we didn't just do it in graphic form, we also  
9 expanded the number of exemplar claims.

10 But I think the question is -- and this is what  
11 was -- and I'll repeat what Mr. Conroy said. He said, I prefer  
12 that you do that in a kind of graphic form as you've done in  
13 this chart, in some kind of graphic form that says with respect  
14 to X this is what they said and this is what the fact is and  
15 this is why we say this is fraud and assert the pattern.

16 I think one of the best examples of it is, if you  
17 will, Judge, is in the what's labeled as Exhibit A in our  
18 opposition, which is happens to be chart three in the second  
19 amended complaint. And there we're talking about CPT upcoding  
20 on the initial exam --

21 THE COURT: You say Exhibit A?

22 MR. KING: It's Exhibit A to our opposition.

23 THE COURT: Yes.

24 MR. KING: Okay. And that's --

25 THE COURT: Is that the one that begins with Roth?

1 MR. KING: Right.

2 THE COURT: Okay.

3 MR. KING: Now, here's a case -- here's a case  
4 where it's saying in this particular claim, which is pled in  
5 our complaint, that the medical bills and records submitted  
6 upon which my client relied bill for a complexity of medical  
7 exam that was not warranted. And there's 186 of the 196 that  
8 we allege that in.

9 Now, is this based on Smith & Brink, you know, or  
10 some lawyers' opinion? This is based on, as is in the record,  
11 our multiple medical experts who have opined that.

12 THE COURT: Tell me why it is not warranted.  
13 That's the problem I'm having.

14 Let's take Roth Khim, that's the first person  
15 there.

16 MR. KING: True.

17 THE COURT: You have the CPT code 99204. Your  
18 expert says the treatment given this person was not warranted.

19 MR. KING: Based on the medical records that were  
20 fashioned by the defendants. A 99204, as is laid out in our  
21 complaint, this is within the four corners of the complaint,  
22 calls for a comprehensive history, comprehensive examination,  
23 medical decision making, which is of moderate -- at least  
24 moderate complexity, and 45 minutes of face-to-face time.

25 And we've alleged that none of those elements,

1 requirements of 99204 are at issue in these 186 patients.

2 THE COURT: Why?

3 MR. KING: Based on the -- based on the medical  
4 records submitted by -- in other words, what we're talking  
5 about here -- if you're going to bill 99204 or 99205, which the  
6 defendants did, you're talking about conditions which require a  
7 serious medical decision making --

8 THE COURT: Let's do this. Let's just use Roth  
9 Khim, and let me go to the complaint. Can you go to the  
10 complaint? Second amended complaint. Can you find Roth Khim  
11 or the series of allegations that Roth Khim is included in?

12 MR. KING: Well, Roth Khim -- well, he's in the  
13 same chart in the complaint.

14 THE COURT: Yes, I see that.

15 MR. KING: Okay.

16 THE COURT: So --

17 MR. KING: I'm sorry, I'm not following your  
18 Honor's --

19 THE COURT: What I want to do is -- it's in the  
20 chart, you've given me the graph.

21 MR. KING: Yes.

22 THE COURT: So I want to see what it is that you  
23 say about the people in that chart. Is that page --

24 MR. KING: That's page 21, I think.

25 THE COURT: 21. 21?

1 MR. KING: Well, that's the introductory paragraph  
2 to the chart.

3 THE COURT: Okay. Well, maybe you can help me out  
4 by finding what it is that is specifically alleged about the  
5 people who are in that chart.

6 MR. KING: Well, the introductory paragraph says  
7 that defendants submitted false medical --

8 THE COURT: Read it slowly. And what -- where do I  
9 need to read?

10 MR. KING: I'm looking at paragraph 99.

11 THE COURT: Paragraph 99.

12 MR. KING: It's page 21. In fact, your Honor,  
13 the --

14 THE COURT: All right. This is the paragraph.

15 MR. KING: Actually, your Honor, if you turn back  
16 to page 20, I think the discussion, the CPT upcoding really  
17 begins there at paragraph 97.

18 THE COURT: All right. 98, it's paragraph 98 is  
19 where you start, right?

20 MR. KING: Actually, 97 on the page before, I  
21 apologize.

22 THE COURT: Okay, 97. 97 says, "First Spine  
23 engaged in CPT upcoding in connection with the alleged  
24 treatment of patients for which Encompass became responsible."

25 By way of example, First Spine, virtually without

1 deviation, billed Encompass for patient's initial office visit  
2 under the CPT code 99204 -- 05 or 99204, then you list the  
3 criteria that meet those codes. And you go on to say that to  
4 warrant a medical bill demanding CPT code 99205, and then you  
5 list the conditions. And then you say false information was  
6 submitted with respect to all those people listed on the  
7 chart. Right?

8 MR. KING: Yes.

9 THE COURT: Now, what's missing from this, it seems  
10 to me, is what's wrong with these people? In other words, you  
11 tell me what it is they're supposed to have, but you don't tell  
12 me what they really do have. I mean, you say it's false, and  
13 there's no allegation about why that's false. If I take Roth  
14 Khim, all I have is that Roth Khim received treatment that got  
15 a CPT code of 99204. I think it was -- 99204 meant he had the  
16 following problems. What I do have is an allegation that he  
17 didn't have those problems. You just say it's false.

18 MR. KING: Well, I think -- not in that paragraph,  
19 your Honor, but I think throughout this complaint we say that  
20 all of the patients seen here, and part of the expert medical  
21 analysis that's made as part of the record in this case, is  
22 that all the people, every single person in this -- identified  
23 in the complaint are automobile accident patients with all the  
24 same diagnoses, lumbar cervical sprain or strain. Nothing  
25 else. And I think that maybe there's a disconnect between your

1 question and my answer, but to bill at the highest level  
2 complexity on an examination and management codes, this is for  
3 somebody that you're going to have to follow for a long time --  
4 it's either one or the other, someone comes in with a gunshot  
5 wound or they have a serious life threatening medical condition  
6 or they may have a chronic condition where it's going to --  
7 there's going to be a continuing doctor/patient relationship  
8 for a long time and you spend a long time with that person, et  
9 cetera.

10 These cases are 99201. This is the lowest medical  
11 complexity, and I think we do set that out in the complaint  
12 with respect to the CPT upcoding, the spinal manipulation, the  
13 heat packs, and all the rest of it.

14 The reason I started with CPT coding is because it  
15 goes back to the whole misrepresentation, because when you  
16 say -- or I understood my brother's argument, which I think  
17 we've already destroyed with their own bills, but I think I  
18 understood their argument to say, well, we thought -- we  
19 thought we would just submit a bill for 25 heat treatments and  
20 see if we could get away with it, even though only 15 or 10  
21 were warranted.

22 But in this case, I think the CPT codes are  
23 different in the sense that a CPT code means something. In  
24 other words, heat pack, well, it's -- everybody sort of gets  
25 what a hot pack is, and they say that they did it and they

1     should be paid for it even though it wasn't medically  
2     necessary. But what's -- where the CPT hits more of a specific  
3     item --

4             THE COURT: So you're saying that if a person comes  
5     in with this lumbar strain and he gets only a heat pack, the  
6     fraud is that they are saying that he has been treated at the  
7     highest risk of mortality, morbidity and/or complication, and  
8     that's the fraud.

9             MR. KING: That in connection with all the other  
10    indicia of fraud. We talk about in this complaint -- and I  
11    think your Honor noted it at the last hearing -- these are all  
12    people that are coming in from accidents where there's no  
13    damage to the vehicles, and they all get the same thing. No  
14    matter how old or young they are, what their sex is, where they  
15    were in the vehicle, how fast the vehicles were going,  
16    everybody gets the same recipe of treatment.

17            Now, is that fraud in and of itself? No, it's  
18    circumstantial, raises an inference of fraud.

19            I think when you take -- and this is not the  
20    creation of lawyers, this is medical expert opinion, and we  
21    only have the one in this case so far. But what you have is  
22    CPT upcoding 186 people out of 196. You've got the illegal  
23    inducements, which I think is immaterial because the Court's  
24    already found that 93A claims survive.

25            You've got the spinal manipulation, there's 186 of

1 those persons out of 196 by the medical expert opinion that  
2 were unwarranted.

3 175 excessive chiro visits out of 196.

4 165 total out of 196 excessive heat treatments.

5 And 161 excessive electric stimulations out of 196.

6 So there's overlap -- and I think we talked about  
7 like a recipe of treatment -- it's not that we're talking about  
8 Roth Khim, and you know, he had one too many hot packs. What  
9 we're talking about is Roth Khim had excessive -- everything  
10 was excessive.

11 But my point about the CPT codes is it really  
12 undermines the argument that, hey, the bill, you know, we could  
13 have a dispute about how many is the right number, because when  
14 they say we gave the person, you know, the full tune-up when  
15 all they did was get under and change the oil filter, then  
16 that's a misrepresentation.

17 THE COURT: And how do we know that's what happened  
18 with respect to Roth Khim? In other words, how do we know that  
19 he didn't get the full --

20 MR. KING: The medical documentation based on the  
21 expert review doesn't warrant that level. The person with that  
22 diagnosis is not entitled to that level facially. We're  
23 talking about on these E and M codes, which are different than  
24 the modality codes, if you will. The modality codes go up to  
25 heat packs, et cetera, but the E and M codes have to do with



1     what type of patient it is and what the medical claim is of  
2     that patient.

3             THE COURT:   What's an E and M code?

4             MR. KING:   Evaluation and management.   That's the  
5     99 and the three letters, it's 201, 202, 203, 204, 205, and  
6     then for reexam there's a 1.

7             THE COURT:   So the allegation is a person comes in  
8     with an automobile accident and he has a lumbar strain or  
9     cervical sprain, and he gets treated as if he had a high risk  
10    of mortality, morbidity, and other complications.   Is that what  
11    you're saying?

12            MR. KING:   That's what I'm saying that they  
13    submitted, they represented in their medical records, and,  
14    again, I think --

15            THE COURT:   And the representation is fraudulent  
16    because, you're saying, the person who comes in with a  
17    diagnosis of cervical sprain is not a high risk of mortality,  
18    morbidity, and/or other complication.   Is that what you're  
19    saying?

20            MR. KING:   Not in any of these cases, your Honor.  
21    This is -- I'm not saying -- I'm not a doctor that somebody who  
22    comes in with a cervical complaint couldn't be someone that --

23            THE COURT:   So why not in these cases?

24            MR. KING:   None of these -- first of all, all these  
25    people all treated for about the same amount of time, all of

1       them were in minor accidents, and all of them -- or I should  
2       say most of them -- and I don't have the count here, were ever  
3       referred for x-rays. They just come to the chiropractor, they  
4       all get the highest levels -- as if everybody who walked in the  
5       door there needed this upper-level examination, the time spent  
6       with them, et cetera.

7               THE COURT: Do you say, for example, that in the  
8       case of all those people, 186 people, whatever that number is,  
9       there was not a high risk of mortality, there was not an  
10      extensive diagnosis, there was not a comprehensive patient  
11      history, and there was not an interaction that lasted 60  
12      minutes in all of those? Is that what you're saying?

13             MR. KING: Absolutely. That's what the medical  
14      records say. That's what the medical records say, and that's  
15      what we've alleged --

16             THE COURT: And where do you allege that?

17             MR. KING: Give me one second, your Honor.

18             I think the first place I would indicate to the  
19      Court is page 16, paragraph 89, which I touched on earlier.

20             THE COURT: Paragraph 89.

21             MR. KING: Page 16.

22             THE COURT: Okay.

23             I look at paragraph 89, you know, that looks like  
24      something I could call negligence. You know, they didn't  
25      examine the person properly, they don't tell you the location

1 of the vehicle. Why does 89 show that there's fraud as opposed  
2 to carelessness?

3 MR. KING: I think in combination with the chart  
4 evidence and the allegations that begin at 122 and continue  
5 thereafter throughout --

6 THE COURT: Paragraph 122.

7 MR. KING: Yeah, 122 and then continue, that's the  
8 beginning of the new exemplar form, all of these --

9 THE COURT: You know, here's what we've been  
10 discussing. Right now you have told me this: You have said  
11 that in none of the people in Exhibit A who are in that Exhibit  
12 A was there a risk of high mortality or morbidity, was there an  
13 extensive diagnosis done, was there an interaction of 60  
14 minutes or more, and so on. And that's what I'm looking for in  
15 this complaint. You tell me in the complaint what it is that  
16 code represents, but it doesn't say is that that's not what  
17 happened in these cases. At least I don't find it yet.

18 MR. KING: Well, I think in paragraph 89, you just  
19 asked the question, well, why is that just not negligence? The  
20 CPT codes that they're following these cases specifically  
21 require that they do the things that you call negligence. I  
22 call it -- I call it sufficient inference of fraud in light of  
23 the fact that we're talking about -- almost 99 percent of the  
24 people in the complaint at the outliers are people that were  
25 just discharged.

1 THE COURT: What this says at paragraph 89 is the  
2 record doesn't show the mechanism of injury, the location in  
3 vehicle, anything about prior medical history. That seems to  
4 address the question that there should be a history,  
5 preexisting condition, that, again, seems to reflect not a good  
6 history taking, physical composition, I don't know what that  
7 is, damage to the vehicle, I don't know whether -- you know, if  
8 a person were to come in, if the doctor were to ask how much  
9 damage happened to the vehicle -- I'm not sure the physician  
10 would ask that question.

11 I guess what I'm saying to you is: When I look at  
12 this, look at paragraph 89. I can't tell whether they're  
13 talking about fraud or somebody who just keeps poor records.  
14 And what I expect to see, frankly, is what we just discussed,  
15 that none of those people in that list had any of the things  
16 that would justify the 89. They didn't have -- the 99204 and  
17 99205, they didn't have a high risk of mortality, they didn't  
18 have these extensive histories taken, they didn't have  
19 extensive analyses and so on. That's what I don't see.

20 MR. KING: With all due respect, your Honor, I  
21 think after the last time that we were here, one of the things  
22 that we had cited or one of the things that we had discussed on  
23 the record -- if I can just go back to that -- your Honor said,  
24 for example, one of the allegations you have says no one has  
25 a -- the person had no previous injury and, in fact, the person

1 did have a previous injury. I understand that. That was the  
2 Court. And then later I said, specific instances earlier you  
3 had cited an instance where the medical documentation generated  
4 by First Spine referred to a prior -- no prior similar medical  
5 condition, and that would be an example of the Court found  
6 satisfaction in terms of, well, what was wrong here? And the  
7 Court answered: Yes.

8 Now, in the -- in the complaint, we've expanded the  
9 exemplar claims, I think, to around 90 or a hundred.

10 THE COURT: Well, you've added more people.

11 MR. KING: Not more people, more allegations of the  
12 type that I discussed the first time in June with the Court and  
13 the Court found that that was at least a sufficient allegation  
14 with specificity of one type of thing that we're discussing  
15 here.

16 THE COURT: What did I say? Didn't I say that you  
17 have to tell me what was really wrong with the person? If you  
18 say that somebody got treated for a lumbar spine as if he had  
19 been a severed spine -- excuse me, he had a strain and he was  
20 treated for as if he had a severed spine, then I understand  
21 what the fraud is. I don't --

22 MR. KING: I think that's exactly what -- I think  
23 that's exactly what -- these people were -- I think that's  
24 exactly what it is here. I think --

25 THE COURT: I know, but you're adding all this

1 now. The point is, I don't see this in the complaint. I don't  
2 see in the complaint the notion that these people who are  
3 listed on that chart that you gave me did not have high  
4 mortality. It may be that they did not have a risk of high  
5 mortality or morbidity, they did not have these examinations  
6 that you say are necessary, but I don't see that alleged.  
7 Maybe there's an inference in here, but I don't see the  
8 allegation. Rule 9 says you have to state it with  
9 particularity, what's wrong with this? As I said, when you --  
10 like at 89, I can see that something is missing from their  
11 medical file.

12 Now, I can assume that that is sloppiness, but I  
13 don't necessarily know that it is fraud.

14 MR. KING: Well, okay. I guess if at this stage in  
15 the procedural posture we allege, and we allege that it's  
16 supported by a medical expert, that the CPT code in connection  
17 with Joe Smith was wrong and it was -- and we are specific,  
18 when -- the time, place, and content, when that medical bill  
19 was issued, where it was issued from, and what the content is  
20 in there --

21 THE COURT: You don't tell me what's wrong with  
22 him. You say it's excessive or that it was more than what was  
23 necessary, and I say why? What's the problem? You tell me  
24 what it says, but you don't tell me why it's fraudulent.

25 MR. KING: Well, I think, your Honor, if -- I guess

1 if we weren't talking about CPT codes and we were talking about  
2 widgets and you got a bill for a widget and that's not the  
3 widget that was delivered or warranted as medically necessary  
4 under the facts, then that would be back to your original  
5 discussion with my brothers, that those -- all of this case  
6 comes down to medical bills that were submitted, right, and if  
7 there were -- if someone gets 15 hot pack treatments --

8 THE COURT: All right. Let me interrupt and tell  
9 you what my problem is. Your adversaries say this is a  
10 question -- this is a matter of opinion. Their expert says  
11 these people -- all the people who got the 99204 codes rightly  
12 were listed because our opinion is they deserved the treatment  
13 that 99204 calls for. You say they didn't.

14 Now, what I'm trying to understand is why isn't  
15 that a difference of medical opinion as opposed to fraud?

16 And what the complaint should allege is that is  
17 fraudulent because none of those people were at risk for  
18 mortality or high morbidity, none of them got x-rays or the  
19 extensive treatment, and none of them were in the office for 60  
20 minutes or more. That kind of thing.

21 MR. KING: I think that -- I think that is what we  
22 say in the complaint, and I haven't committed all 800  
23 paragraphs of the complaint to my memory, but I think that  
24 the --

25 THE COURT: Can you just find those?

1 MR. KING: Well, for instance, one of the things  
2 that we have alleged here at page 60 would be -- and I think  
3 the question becomes at some point what's the quantum at this  
4 procedural posture? This is --

5 THE COURT: Well, I can tell you what the quantum  
6 is. You've got to explain to me why this is fraud and not  
7 something else.

8 The problem is you've got a lot of people here, and  
9 you say all of these people were overtreated or the company was  
10 overbilled for these people.

11 Now, if you have one person -- it would be easier  
12 to do this. You could say Mr. Khim or -- what's Mr. Khim's  
13 last name?

14 MR. KING: Roth.

15 THE COURT: Mr. Khim came in and he had a splinter  
16 and they treated him as if he were going to die. I mean, they  
17 billed for him as if he were going to die, that we had to put  
18 him on life support system, blood transfusion, and so on. And  
19 he had a splinter. Now, I can see what's fraudulent about  
20 that. The guy had a splinter, he was treated as if he were  
21 going to die.

22 But what you say is you've got 186 people, all of  
23 whom were treated as if they were going to die, and it was just  
24 false. And I don't know what's false about this because I  
25 don't know maybe they were going to die.



1 MR. KING: Okay. Well, your Honor, I think in your  
2 example if -- what we say in here is they all had minor lumbar  
3 sprain or strain. Just all had the same thing apparently, and  
4 they were treated as if they were going to die.

5 THE COURT: Where do you say that? Minor sprains,  
6 where do you say that?

7 (Discussion off the record.)

8 THE COURT: You've got my splinter somewhere in  
9 this complaint.

10 MR. KING: No, I think --

11 THE COURT: No, no, minor sprain.

12 MR. KING: I think the point is, even in the  
13 Court's sort of analogy, the splinter, if I said splinter and  
14 they treated like they were going to die, it's just -- I don't  
15 think there's much difference between what we're saying here,  
16 it's just maybe degree.

17 THE COURT: So what is it you say about these  
18 people in Exhibit A?

19 MR. KING: Well, at paragraph 85 -- and I'll get  
20 back to 122 -- at paragraph 85 on page 14 --

21 (Pause.)

22 MR. KING: -- of the complaint --

23 THE COURT: Yes, I'm looking at it.

24 MR. KING: You sort of go down the laundry list of  
25 what all these patients have. And I would be -- I would submit

1 to the Court that soft-tissue injury standing alone is your  
2 splinter. In the world of neuromuscular meds -- all of these  
3 people had minor strain/sprain, generally no other medical  
4 intervention, et cetera, and they were all treated -- not only  
5 on the CPT code analysis, but in terms of all the modalities.  
6 I think that our expert opined in connection with the motions  
7 that we first argued before your Honor last summer or two  
8 summers ago that all of these people, given the medical  
9 documentation and the diagnoses of soft tissue strain or  
10 sprain, would have gotten along better without medical  
11 interception and in less time than they actually went for  
12 alleged treatment with the defendants and bills were generated  
13 in connection therewith.

14 And I think that -- I guess that's the splinter in  
15 your example.

16 Going back to the exemplar claims and beginning at  
17 paragraph 122 -- and we lay these out at Exhibit I to our  
18 second opposition to the motion to dismiss. We've got  
19 multiple, multiple examples specifically pled from the patient  
20 files that I think boil down one way or another to the  
21 following categories -- and I don't know that the Court wants  
22 me to go through and read every paragraph, but where you have  
23 the false medical histories in the medical documentation, and  
24 those are alleged with specificity beginning on 122 and going  
25 through --

1 THE COURT: 122 alleges false medical histories?

2 MR. KING: Beginning at that point. 122 actually  
3 does. It talks about in connection with that particular  
4 claim. 126 talks about billing where my client received  
5 billing and the patient testified that she never saw the  
6 chiropractor. Other categories that are contained in that  
7 section patients almost invariably, and I don't know that I set  
8 this forth generally, but specifically with regard to certain  
9 claims here at the back of the complaint, almost invariably  
10 everybody who goes to that clinic is found to be disabled,  
11 totally disabled generally for a period of time, and then  
12 almost without fail partially disabled until they're  
13 discharged. And time after time after time, and as we've  
14 alleged at least at 212, the patient would have no lost wage  
15 claim form and no history of any disability other than the sort  
16 of generic template-based medical that was by the defendants  
17 and submitted to our client pursuant to the PIP statute.

18 Instances in here where not only is the medical  
19 history false, but the mechanism or the accident so the  
20 mechanism of injury is -- seems to be divorced from reality,  
21 where we've got people with police reports and other emergency  
22 reports that indicate no injury, and then we have people  
23 treated days or weeks later at the clinic -- and these are  
24 alleged with specificity -- and received the highest level  
25 CPT E and M codes.

1           We've got instances in here where we've got  
2           emergency room records where the people that actually went to  
3           the emergency room and contradict the medical records of First  
4           Spine; i.e., no head trauma, no head contact at the emergency  
5           room right after the alleged incident, and then head trauma in  
6           the medical reports from First Spine.

7           Similarly, this was noted in our medical expert  
8           affidavit originally, time and time --

9           THE COURT: Let me interrupt you just a minute.  
10          You spent a lot of time on the allegations and fraud with  
11          particularity. You have a 93A claim in this case, and the 93A  
12          claim talks about an unfair and deceptive act or practice  
13          without sort of requiring this 9(b) particularity, does it?

14          MR. KING: It does not require.

15          THE COURT: What's wrong with just letting the case  
16          go forward on the 93A claim and not having to deal with these  
17          fraud claims?

18          MR. KING: Well, I think my clients have been  
19          defrauded, and I think we have set forth --

20          THE COURT: But what relief are you going to get  
21          from the RICO statute, from the civil conspiracy statute, and  
22          all the rest that you're not going to get from 93A?

23          MR. KING: Well, I think, frankly, there's a  
24          possibility of quintuple damages under the precedent of this  
25          court, not your Honor, but the U.S. district Court of

1 Massachusetts with those combinations.

2 THE COURT: You mean you get five times -- what's  
3 quintuple, five times the actual damages in RICO?

4 MR. KING: Right. Judge Young had awarded that in  
5 another racketeering case in which my firm was involved, where  
6 it was -- obviously, I don't set forth those arguments out in  
7 the complaint, but I think the issue is that RICO serves a  
8 different purpose and policy purpose than Chapter 93A to a  
9 certain extent, and in that case we were successful.

10 And I think that this -- I think that what we've  
11 got here is medical records that were just -- there was a mill,  
12 as we've set forth, and they all gave the same treatment. And  
13 what we say is those medical records -- and I think your Honor  
14 hit on it exactly at the top of this hearing -- those medical  
15 records are representations of something, and although they  
16 wanted to say, na, they're just a suggestion --

17 THE COURT: I'm past that. I believe the medical  
18 records represent a representation that what was billed for was  
19 medically necessary. I don't have any problem with that  
20 whatsoever.

21 MR. KING: Okay. And what we've said is it  
22 wasn't -- these weren't medically necessary for these reasons,  
23 and these are folks that came in with a splinter, soft-tissue  
24 injury, all the same splinter, and they all received life  
25 threatening health care for months, three four times a week for

1 three months.

2 THE COURT: It would have been easier, I guess, for  
3 me to understand if the allegation was they got treated for  
4 life saving and this is a treatment they should have had. They  
5 should have taken something and taken that splinter out and it  
6 would have cost X.

7 MR. KING: But, your Honor, I think at this point  
8 in the proceedings, I think that there is some area left for  
9 discovery and a finder of fact. I think there will be --

10 THE COURT: If you are in a position --

11 MR. KING: We're saying in all cases --

12 THE COURT: If you're in a position to know that  
13 the treatment was excessive, don't you have some sense about  
14 what should have been the treatment?

15 MR. KING: Well, I think -- for instance, your  
16 Honor cited the hot pack. We're saying it's excessive if it's  
17 beyond whatever our number was in the complaint. That's based  
18 on the medical experts. The flip side of that, there was 165  
19 people that got that, the others we're not claiming that that's  
20 an indicia of fraud with respect to those 25 people. But in  
21 every single -- in connection with every patient in the  
22 complaint -- there's only 196, I say only, luckily perhaps, but  
23 of the 196 people, I think there's only six people that don't  
24 fall into every overlapped category. So we're not talking  
25 about, well, maybe it was just negligent that they, you know,

1 miscoded, they had 99204 and it was a slip of the pen or  
2 something like this. It was that and the overutilization of  
3 treatment.

4 THE COURT: All right. Let me ask you, you have  
5 RICO conspiracy, civil conspiracy, why do you need all that?  
6 Even if you get quintuple damages, do you get quintuple  
7 damages -- this is all the same case. Your claim that people  
8 went to these clinics, they received more treatment than was  
9 medically necessary, the defendants knew all that, billed your  
10 company for that, and violated the RICO statute, committed  
11 fraud and can I just understand what is it the conspiracy  
12 brings you, let's say you got the substantive RICO counts?

13 MR. KING: I agree with your Honor. The most --  
14 you know, the most that my client could request pursuant to the  
15 prayers for relief in the second amended complaint would be  
16 quintuple damages, attorney's fees, and costs. So if that  
17 answers the Court's question. So there would be nothing gained  
18 by -- if we're allowed to go forward on the substantive RICO  
19 count and the 93A claim, in terms of dollar damages, there's  
20 nothing more to be gained. Although I would say that in terms  
21 of the conspiracy count --

22 THE COURT: Common law conspiracy count.

23 MR. KING: Excuse me?

24 THE COURT: The common law, Massachusetts civil  
25 conspiracy.

1 MR. KING: Right. If the RICO conspiracy count  
2 stays, I think that the substantive Massachusetts conspiracy  
3 could be out. But, I mean, I'm saying that as I stand here,  
4 but I'm concerned with joint and several liability, and I don't  
5 know how that would shake out if, let's say, your Honor allowed  
6 the RICO conspiracy to move forward and then there was some --  
7 at a later date there was some issue that came out on a summary  
8 judgment and then we -- and we lost the opportunity to pursue  
9 the common law conspiracy.

10 And I'm not -- unfortunately, perhaps my brother  
11 has a thought, but I'm not prepared to just concede that  
12 there's no set of facts where that could become relevant,  
13 especially where it concerns joint and several liability with  
14 respect to the various players in this case.

15 THE COURT: Well, you need -- this is a classic  
16 case where everything is pleaded and I can't determine the  
17 necessity for pleading all of this. If you plead the  
18 substantive RICO, you have to prove as to each defendant that  
19 person violated the RICO statute or that entity violated the  
20 RICO statute.

21 MR. KING: Let's say this, your Honor: Let's say  
22 if all the counts go forward and it goes to the jury, for  
23 whatever reason the jury decides that, you know, mail fraud  
24 just isn't there, I mean, it's almost one of those scenarios  
25 you couldn't foresee because if -- but --



1 THE COURT: But if mail fraud is not there, you  
2 don't have substantive RICO. Maybe you have a conspiracy to  
3 commit mail fraud and you don't have actual mail fraud.

4 MR. KING: Or maybe you have a conspiracy to commit  
5 common law fraud in that case.

6 I mean, I think there is a set of facts where I'm  
7 loathed or I think I'd be remiss to my client if I just said,  
8 well, that's just surplusage and just cull it from the  
9 complaint. Obviously, I'll be bound by the Court's decision  
10 with respect to its substantive analysis of whether we've met  
11 what I feel is still a minimal burden under Connolly v.  
12 Gibson. And if what we've set forth in our complaint taken as  
13 true today is if any set of facts is proven will he be able to  
14 make out this substantive RICO count? And I think the idea,  
15 the mail fraud, that's a non-starter because all of these  
16 things are alleged to be mailings. This is a case that's  
17 conducted through the mail.

18 And so the question becomes if they submit medical  
19 bills and records that have implicit and, in this case,  
20 explicit assertions or representations that it's medically  
21 necessary and we've set forth time and time again time, place,  
22 and content, why was it medically necessary? I think that's --  
23 I think that's sufficient on all the counts.

24 THE COURT: Okay.

25 Do you the defendants want to say anything else?

1 MR. CONROY: Not at this time, your Honor.

2 THE COURT: All right. I'm going to take a short  
3 recess and see where I stand on all of this.

4 (Recess taken.)

5 THE COURT: The amended complaint has over 700  
6 allegations, separate paragraphs containing allegations. The  
7 first observation I make is that that it has that number of  
8 allegations doesn't mean that the complaint meets the  
9 requirement for alleging fraud. All of the counts of this  
10 complaint that are at issue under the present motion relate to  
11 the question of whether the plaintiffs have sufficiently  
12 alleged fraud, and the requirement under the rule, Rule 9(b),  
13 is that in all of averments of fraud or mistake, the  
14 circumstances constituting fraud or mistake shall be stated  
15 with particularity.

16 There is a great number of allegations in this  
17 complaint which could be taken to be allegations of  
18 carelessness, sloppiness, or even allegations of coincidental  
19 treatment. However, I take account of the fact that I am  
20 reviewing this complaint pursuant to a motion under  
21 Rule 12(b)(6) in which I must accept as true all well-pleaded  
22 factual allegations in the complaint and draw all reasonable  
23 inferences in favor of the plaintiff. And I should grant the  
24 motion to dismiss only if it is clear that no relief can be  
25 granted under any set of facts that could be proved consistent

1 with the allegations.

2 Now, it's important that the allegations, if they  
3 are to be accepted as true, be well-pleaded, and under  
4 Rule 9(b), that means pleaded with particularity.

5 I've looked at this complaint carefully, and I find  
6 that there is reason to deny this motion as to all counts on  
7 the basis of the allegations beginning with paragraph 85, and I  
8 point to 85 in the first bulleted statement under that  
9 complaint, under that paragraph.

10 Paragraph 85 says the patients who are listed in  
11 Exhibit A complain only of soft tissue injury. Paragraph 97  
12 says that the defendants upcoded these patients to code 99205  
13 or 99204. There are a number of patients who are listed at  
14 99205, under that code, and under that code, under AMA  
15 standards, the patient must have a high risk of mortality,  
16 morbidity, and/or complications, extensive diagnoses, and  
17 review of complex data. The defendants were required to obtain  
18 comprehensive patient histories, conduct comprehensive  
19 examinations, and evaluate the patient face to face for  
20 approximately 60 minutes.

21 Taking as true that the patients on Exhibit A have  
22 soft tissue injuries and were treated as if they were at risk  
23 for death or serious complications and coded as such, I believe  
24 that the allegations are sufficient at least with respect to  
25 those claims to withstand the present motions.

1 I don't make any comment with respect to remaining  
2 allegations of fraud, but I have to review the complaint as a  
3 whole and determine whether relief could be granted on these  
4 complaints consistent with the allegations and if those  
5 allegations prove to be true, the allegations about upcoding  
6 people with soft tissue injuries, then the plaintiffs would be  
7 entitled to relief under each of those counts, each of the  
8 counts that are at issue; namely, Counts I, II, III, V, and VI.

9 I expect that I'm going to have occasion to revisit  
10 some of these counts, but for now I'm going to let this  
11 complaint proceed on all of these counts, I through VII, and  
12 I'll, if necessary, revisit this at some later time in the  
13 proceeding.

14 Particularly even if the plaintiffs don't make any  
15 further -- or rather, defendants don't make any further  
16 motions, I would like to revisit with the plaintiffs the two  
17 conspiracy counts, the common law conspiracy, the RICO  
18 conspiracy, and the counts that allege a RICO conspiracy in  
19 which the plaintiff is an innocent -- what's it called, an  
20 innocent victim?

21 So at some point, as I say, I want to look at the  
22 complaint again.

23 For the time being, however, the motion to dismiss  
24 is denied as to all counts.

25 I'm going to have my clerk set this case up for a

1 scheduling conference so we can schedule this case through at  
2 least to any further dispositive motions and perhaps trial,  
3 because I think the best way to move this case is to get it to  
4 trial as quickly as possible. And so I want to do that.

5 Are there any questions?

6 All right. Do you have any question, sir?

7 MR. CONROY: Just in terms of timing on filing  
8 answers and --

9 THE COURT: Doesn't the rule require that the  
10 answer be filed within ten days after this ruling?

11 MR. CONROY: If we can request 30 days.

12 THE COURT: All right. Is there any problem with  
13 an answer in 30 days?

14 MR. KING: No, your Honor. Previously the parties  
15 had submitted an agreed-upon discovery schedule with the Court,  
16 I would like to resubmit that in --

17 THE COURT: I think we have to have a new  
18 scheduling conference, because we have a new complaint, and  
19 we'll just go over it again.

20 So you have 30 days. So the answer will be filed  
21 not later than December 13th. And then shortly after that,  
22 we'll have a scheduling conference so we can schedule all the  
23 events that are to take place in this case.

24 All right. Thank you.

25 (Court adjourned at 5:11 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/ Debra M. Joyce

Debra M. Joyce, RMR, CRR  
Official Court Reporter

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Date